

Antitrust Damages: the European Commission's proposal

Some observations

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“Effective Cartel Deterrence”
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Antitrust Damages Claims have come to Europe

- European Commission encourages victims to seek reparation
 - European Commission's White Paper (April 2008) – compensation
 - No punitive damages – but pre-trial interest
 - Full legal standing for full damage – *Courage* (2001), *Manfredi* (2006)
 - Passing-on defense likely to be successful
 - No opt-out class actions
 - Legislative initiative on Antitrust Damages Actions (June 2013)
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- Slowly emerging (visible) practice – seminal initiatives
 - Special Purpose Vehicle's
 - Third party litigation funding



DG Comp seeks damages from elevator cartel

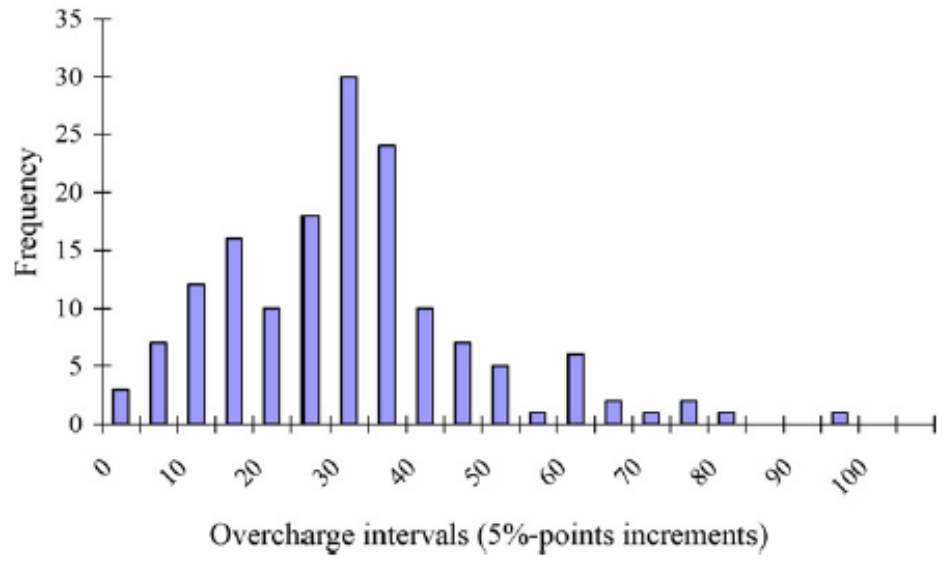
13 June 2008

The European Commission is taking private enforcement action against the four elevator manufacturers it prosecuted last year.

DG Comp fined Thyssenkrupp, Otis, Schindler and Kone €992 million - the commission's highest-ever cartel fine - for price-fixing, bid-rigging, allocating markets and sharing confidential information.

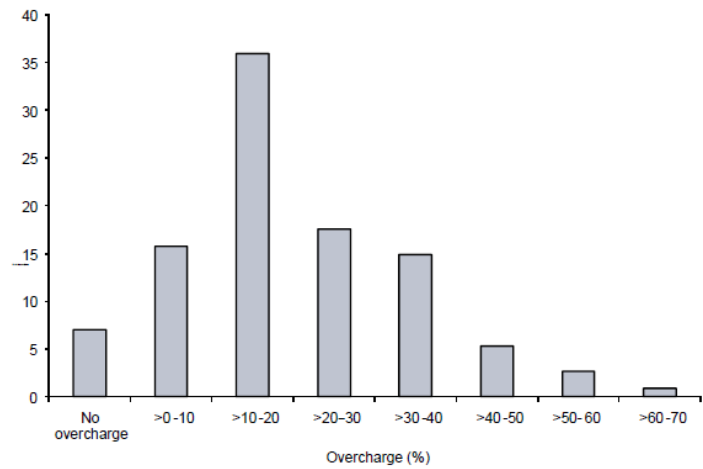
The offences took place between 1995 and 2004, but DG Comp said at the time that the effects could continue for as long as 50 years, because the company that installs an elevator usually carries out the maintenance.





Source: Bolotova (2009)

Fig. 2. Frequency distribution of cartel overcharges: modern international cartels.



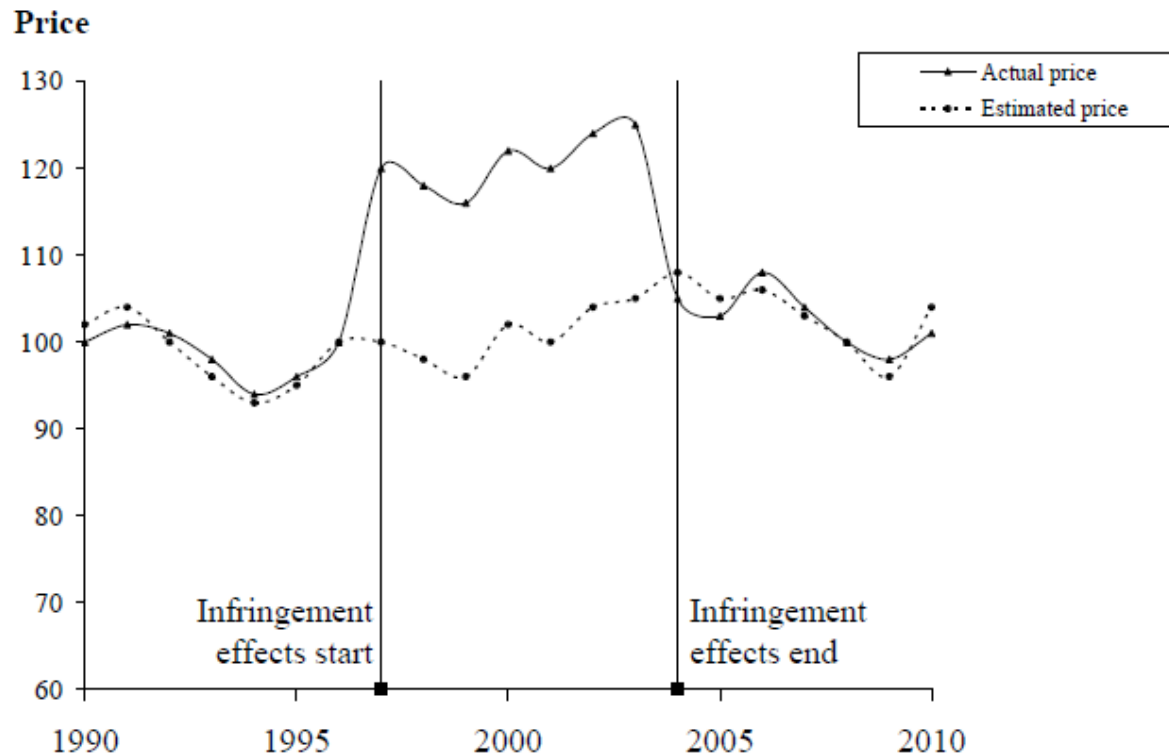
Source: Draft Guidance Paper *Quantifying Harm* (2013)



Various methods to determine the “but-for price”

- Before-and-after method
- Yard-stick method
- Cost-based estimation
- Structural estimation
- Structural modeling





Source: Guidance paper *Quantifying Harm* (2013)



The Commission's Antitrust Damages Package (June 2013)

- Recommendation on collective redress mechanisms:
 - Need for collective redress mechanisms – cross-border
 - Loser pays principle
 - National registry
- Directive on ground rules for competition damages claims:
 - Presumption of harm; right to full compensation
 - Binding final infringement decisions across Member States
 - Passing-on defense; indirect purchasers suits
- Practical Guide on quantifying harm in competition damages claims:
 - But-for; hypothetical counterfactual
 - Sets low standard – “estimate of the scenario likely” (9)
 - Leaves room for development – “can evolve over time” (16)



Collective Redress:

Premise that US-style system of class actions are a source of abuse

- Entity with non-profit making character and direct relationship (4)
- Declare the origin of the funds (14)
- Third party cannot influence procedural decisions, including on settlements (16(a))
- Opt-in principle only (21)
- No contingency fees/interest permitted (30)

- Concern for abuse seems exaggerated – presumption of harm; signals little faith in courts
- Seems to favor the “CDC-model” – “the person that acquired his claim” (7.3 Directive):
 - Is for-profit model – but profit is “victim’s” compensation
 - Issue of fair premium under asymmetric information and natural monopoly aspects
 - Contingent purchase price seems closer to share holder relationship
- May excessively hinder objective of access to justice and stronger enforcement
- Suggestion to empower public authorities is weak (7)



Competition Damages Claims:

Premise that cooperative enforcement needs to be protected

- Leniency corporate statements and settlement submissions undisclosed (6.1)
- Information contained in it not admissible (7.1)
- Leniency application (immunity) has no joint and several liability, unless others are unable to pay (11.2.)

- Concern for leniency and settlement programs seems exaggerated:
 - leniency-addiction of agencies
 - leniency-proofing by cartels
- Application or settlement need not be successful, for information to be protected
- The European Commission vault – detailed attachments
- Commission should be careful what material to accept and what to refuse – no incentive



Some addition observations on the directive

- Decisions binding across Member States: signals lot of faith in courts
- Defendant that wants to invoke passing-on defense needs to show that first indirect purchasers have legal possibility to claim compensation (12.2)
- Indirect purchasers need to show direct purchasers damages (13)
- Consensual dispute resolution – “settlements in smoke-filled rooms”; registry

